IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: California Power Exchange Corporation	No. 01-70031
City of San Diego, Petitioner,	
v.	No. 00-71701
Federal Energy Regulatory Commission, Respondent.	

SUPPLEMENTAL BRIEF OF THE FEDERAL ENERGY REGULATORY COMMISSION

Pursuant to Fed.R.App.P. 21(b) and this Court's order of February 16, 2001, the Federal Energy Regulatory Commission ("FERC" or "Commission") submits this supplemental brief in opposition to the Petition for Writ of Mandamus ("Pet.") filed by the City of San Diego ("Petitioner"). Although it is unclear exactly what action Petitioner seeks to mandate, it appears to be that the Commission "promptly establish standards and procedures to set just and reasonable prices [to] govern refund claims by wholesale purchasers . . . . [and] obtain the necessary record evidence to make the statutorily required determinations." Pet. 21-22. Petitioner is not a "wholesale purchaser" of electricity nor has it established that it would be entitled to make any

refund claims against a wholesale purchaser. Moreover, Petitioner seeks redress on state-wide matters, *e.g.*, Pet. 2, even though it is served by only one of the State's investor-owned utilities ("IOUs"), San Diego Gas & Electric ("SDG&E").

Seeking mandamus does not obviate the need to establish the jurisdictional prerequisites for invoking this Court's jurisdiction. Petitioner fails to show that it has standing to maintain this action. Further, as this Court has ruled repeatedly, where, as here, non-final agency action is involved, mandamus can be allowed only in the most extraordinary situations. Petitioner fails to show this is such a situation. Accordingly, the writ should be denied because (1) Petitioner lacks standing, (2) Petitioner will not be irreparably injured if the writ is denied, (3) Petitioner cannot show a clear and indisputable right to the requested relief, (4) the Commission has absolute discretion to control its docket, and (5) the Commission's course of conduct satisfies its statutory responsibilities.

ARGUMENT

I. Petitioner Has Not Shown The Required Injury-In-Fact

A showing that Petitioner has suffered redressable injury-in-fact as a result of the challenged action is required to establish standing, while a showing that the claimed injury cannot otherwise be redressed is required for mandamus to issue. Petitioner fails on both injury requirements. In summary, Petitioner lacks any actual, concrete injury

related to rates because it is subject to a legislatively-imposed rate freeze, and will suffer no injury from the alleged delay because any refunds it may receive will include interest. Accordingly, Petitioner lacks the requisite standing and irreparable injury needed before the writ can issue.

A. Petitioner Lacks Standing To Invoke This Court's Jurisdiction

The doctrine of standing "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)."[T]he irreducible constitutional minimum of standing contains three elements . . . .[1] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical . . . .[2] a causal connection between the injury and the conduct complained of . . . and not th[e] result [of] the independent action of some third party not before the court . . . . [3] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and citations omitted)[1]; *accord, e.g., Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000). Petitioner fails on all three elements.

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[1] When standing rests on choices by third parties, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability." *Id*. at 562.

The gravamen of the Petition is that "FERC has unreasonably delayed performing its duty under the FPA to determine the lawful charges and order appropriate refunds." Pet. 1. Based on that grievance, one would assume that Petitioner is entitled to the referenced refunds, and has been arguably injured by the claimed delay by currently paying higher rates for electricity. But, in fact, neither assumption is correct. Petitioner is not itself entitled to FERC refunds, and its current rate is unaffected by FERC action on refunds.

FERC's rate jurisdiction extends only to wholesale sales of electric energy in interstate commerce, 16 U.S.C. § 824(b). Petitioner does not purchase electric energy in the wholesale market, but, rather, "purchase[s] retail electric service" from SDG&E. Pet. 5 ¶ 1. As a result, Petitioner is not entitled to seek refunds from FERC for alleged overpayments in the wholesale market. This point is emphasized by the fact that SDG&E, not Petitioner, filed the original complaint seeking rate relief for wholesale sales in the California market; indeed, Petitioner did not even seek to intervene in that proceeding. *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 at pp. 61,604-05 (2000)(listing of intervenors does not include Petitioner).

Second, Petitioner's electric rates are governed by AB 265 (September 6, 2000)(Attachment 1 hereto), which set a ceiling for SDG&E's retail energy rate for the period June 1, 2000 through December 31, 2002 (and possibly for another year) at 6.5

cents per KwH. *See* AB 265, Section 2, § 332.1(b). Thus, regardless of what SDG&E paid for wholesale electricity since June 1, 2000, it can currently charge Petitioner no more that 6.5 cents. Pet. 8 ¶ 6. Because Petitioner's current retail rate is set by AB 265, FERC action will not determine what Petitioner currently pays.[2] Accordingly, Petitioner will suffer no actual harm connected to FERC action.

Petitioner attempts to overcome its lack of current harm by noting that AB 265 "allows SDG&E to record the difference between the retail revenue collection and wholesale costs in a balancing account." Pet. 8 ¶ 6. While Petitioner implies that SDG&E will be recovering the differential shortly, the reality is that SDG&E cannot increase its rates above the 6.5 cent ceiling until after a CPUC decision regarding SDG&E's "prudence and reasonableness" in procuring electricity is completed. *See* AB 265 Section 2, at § 332.1(g). Thus, a number of future steps must fall into place before Petitioner might even be faced with possible harm from a higher rate than what is currently allowed by AB 265.[3] Whether and to what extent FERC action on refunds

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[2] Because AB 265 establishes a ceiling, it is possible that FERC-ordered refunds could reduce SDG&E's actual rate below that ceiling, and, if the reduction were flowed through to retail customers, Petitioner's rate could fall below the ceiling. Petitioner offered no evidence, however, that FERC-ordered refunds would reduce SDG&E's rates below 6.5 cents. Without such evidence, the possibility, let alone the reality, that a FERC refund to SDG&E would have any effect on Petitioner's current rate is unsupported.

[3] *See* § 332.1(c) (requiring utilization of revenues from sales of electricity from company-owned or managed generation assets to offset any undercollections).

would be considered in such a proceeding is unknown, but, in any event, Petitioner will continue to pay the rate set by AB 265 without regard to FERC action on refunds. Thus, the possibility that SDG&E may at some future date recover the differential does not lead to current or imminent actual harm to Petitioner related to FERC actions that would satisfy the first element of standing.

Likewise, Petitioner has not satisfied the second element of standing: that the alleged injury can be traced to Commission action. Petitioner currently pays a rate set by AB 265, not a rate set by FERC. Indeed, FERC does not set retail rates. As discussed above, the CPUC must review and approve any rate sought by SDG&E before it goes into effect.[4] Thus, even if Petitioner's retail rates were to change in the future, they would do so based on CPUC (or, possibly, state legislature) action, not FERC action. The necessary involvement of third parties before the claimed harm can occur means the second element of the standing requirement is not satisfied. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

[4] Under the filed rate doctrine, state regulatory agencies are required to flow through any wholesale costs allowed by FERC that are included in retail rates. Two California IOUs are currently seeking in federal district court litigation to enforce this doctrine for their wholesale electricity costs. The CPUC is contesting vigorously the application of the doctrine in those cases.

Finally, action by this Court is not likely to have any effect on the rates paid by Petitioner. Those rates are set by AB 265, and are subject to change only upon ruling by the CPUC.

In sum, Petitioner fails to satisfy any element required to establish its standing.

II. Petitioner Fails To Show Irreparable Injury To Justify Grant of the Writ

A showing of immediate irreparable injury must be made where a court is asked to take extraordinary action in a pending agency matter. *See Clark v. Busey*, 959 F.2d 808, 813(9th Cir. 1992)(requiring a showing of "irreparable injury, that is damage or prejudice not correctable on review of the final agency action"). For mandamus actions, this Court has denied the writ where petitioners "failed to demonstrate they face any irreparable injury that is not correctable on review of the final [agency] action." *Public Util. Comm. of Oregon v. BPA*, 767 F.2d 622, 630 (9th Cir. 1985). On what constitutes irreparable injury, this Court has found "purely monetary injury is compensable, and thus not irreparable." *E.g., Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 851 (9th Cir. 1985).

As the gravamen of its claim, Petitioner contends that "order[ing] appropriate refunds" has been delayed. Pet. 1. As noted, Petitioner's retail rate is not set by FERC, and thus it is unclear whether, when, and how any refunds that a wholesale purchaser, such as SDG&E, might receive, would reach Petitioner. Nonetheless, refunds seek to

remedy purely monetary injury, and thus delay in their recovery cannot be considered irreparable. A legal remedy -- refunds with interest-- can make parties whole for any delay. Indeed, the controlling statutory provisions for FERC wholesale rates already provide for interest on refunds. *See* 16 U.S.C. § 824*e*(b) (Section 206(b) of the FPA)("The refunds shall be made, with interest . . . "); *see also* 16 U.S.C. § 824*d*(e)(Section 205(e) of the FPA) (same).

Addressing wholesale sales, and despite the limited refund period allowed by Section 206(b) of the FPA, the Commission still "condition[ed] its market rate authorizations for public utility sellers to the ISO and PX on continuing the refund obligation through December 31, 2002." *San Diego Gas & Electric Co*., 93 FERC ¶ 61,120 at p. 61,350 n. 5 (2000)("November 1 Order")(Attachment A to Petition). The Commission rejected arguments that it did not have the power to order such a refund condition, indicating that it was "tak[ing] action pursuant to Section 206(a) to condition future approvals on a refund obligation in order to check rates until longer-term remedies are in place." *San Diego Gas & Electric Co*., 93 FERC ¶ 61,294 at p. 62,010 (2000)("December 15 Order")(Attachment C to Petition).[5]

[5] It is noteworthy, though coincidental, that FERC's refund period ends on the earliest date that the rate freeze under AB 265 would end.

On the question of pre-October 2, 2000 FERC refunds, an issue raised here (*see* Pet. 10), and below (*see* November 1 Order at 61,377-81 (Staff legal analysis)), while the FPA does not grant FERC the power to order refunds retroactively, "in some limited circumstances . . . the Commission can order refunds for past periods." November 1 Order at 61,381. One such circumstance is "as a remedy to correct legal errors found by an appellate court upon judicial review." *Id*. (citations omitted). Thus, if a court requires pre-October 2 refunds, a legal remedy is available.[6]

The availability of refunds with interest to wholesale purchasers negates any claim of irreparable injury. *E.g.*, *Cities of Anaheim, Riverside, etc. v. FERC*, 723 F.2d 656, 661 (9th Cir. 1984)(rejecting argument that delay caused "'forced loans' [that] irreparably harm [the cities] regardless of subsequent refunds"). As indicated, the Commission has put an extended refund condition in place to protect consumers. This coupled with the requirement that refunds be made with interest offers an available legal remedy for SDG&E should it prevail on its refund claims. In these circumstances, Petitioner fails to show that its claimed injury is "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm."

[6] On the retail level, Petitioner has another possible avenue to pursue through the CPUC's "prudence and reasonableness" hearing under AB 265, Section 2, § 332.1(g).

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985)(internal quotation marks and citations omitted; emphasis in original).

III. Petitioner Fails To Show A Clear and Indisputable Right To Mandamus

This Circuit follows a three-part test for determining whether mandamus of agency action lies. "Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the plaintiff's s claim is clear and certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986)(internal quotation marks and citations omitted); *accord, e.g., Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499,1508 (9th Cir. 1995). Each element must be satisfied before mandamus can issue. We have shown another adequate remedy, refunds plus interest, exists for wholesale rates. As we now will show, the other two elements for mandamus are not present here.

Petitioner has not demonstrated that it has a "clear and certain" claim to immediate refunds or to an immediate ruling on what it terms "threshold legal questions" concerning FERC rates. Pet. 17. Petitioner is not a wholesale purchaser, its current retail rates are capped, and it has not shown that, even assuming wholesale refunds were due, those refunds would reduce its retail rate below 6.5 cents. In addition, Petitioner asks this Court to require the Commission to shift priorities from

its forward-looking effort to correct market structure problems to a backward-looking examination to ascertain the legal and factual grounds on which past refunds could be based. Pet. 18. Given the exigency of each, new California development, the Commission reasonably set its priority as trying to provide a just and reasonable market structure for the future, while leaving remedies for the past to a later time.

This approach follows from the statutory scheme. First, the Commission found it may lack FPA authority to order pre-October 2 refunds. November 1 Order at 61,370-71. Second, it did not find "specific exercises of market power . . . [or] reach definite conclusions about the actions of individual sellers." November 1 Order at 61,350; *see* December 15 Order at 61,998 (same). As refunds can come only from specific sellers, the absence of such findings meant that the § 206 prerequisite – a finding that certain seller(s)' rates were unjust and unreasonable – for setting new rates had not been satisfied, and thus no refunds were possible. That contrasts with "the clear evidence that the California market structure and rules provide the opportunity for sellers to exercise market power when supply is tight and can result in unjust and unreasonable rates." November 1 Order at 61,350. With that prerequisite finding, the Commission recognized it was "obligated under FPA Section 206 to take action to establish market rules, regulations and practices that will ensure just and reasonable rates in the future." *Id*.

This approach also tracks FERC's statutory obligation. By concentrating on "market reforms that are needed immediately," the Commission sought to rectify structural problems that could continue to create the opportunity for possible unjust and unreasonable rates. December 15 Order at 61,982. This meant leaving "retroactive refund and retroactive remedial authority issues" for another day, *id*., but the extended refund condition and payment of interest provides a means for full recovery if violations are found. *See* December 15 Order at 62,011 (refund condition operates "as a consumer protection backstop"). This rational choice of how best to approach the problems is fully committed to agency discretion. "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. 821 831-32 (1985). The condition also gives the Commission time to gather and to analyze information for determining whether specific violations did occur and how to remedy such cases. *See* December 15 Order at 61,998-99 (noting issues and Commission responses). Setting an appropriate just and reasonable standard for market-based rates is best done by a mixed fact-law review of the underlying information, given that the "process of ratemaking is essentially empiric."*Bd. of Trade v. United States*, 314 U.S. 534, 546 (1942). As there is "no precise legal formulation for setting just and reasonable rates and no precise bright line for when a rate becomes unjust and unreasonable," the

Commission must examine different types of information to make the empiric decisions of whether any seller had crossed the imprecise line between lawful and unlawful rates. December 15 Order at 61,998-99.[7]

Moreover, Petitioner is simply incorrect that the Commission has not already undertaken any inquiry about facts necessary to address the refund issue. Prior to the November 1 Order, the Staff undertook an investigation and issued a report addressing the causes of the pricing abnormalities in the summer of 2000. *See* November 1 Order at 61,374-76 (brief overview of Staff's conclusions). The December 15 Order, at 62,011-12, required all sellers who exceeded the $150 breakpoint to file weekly reports, starting January 10, 2000, about their sales, and required the ISO and PX to file information for all bids above $150 on a monthly basis. In addition, Staff has requested and received from the ISO bid data for the period October 2, 2000 through December 31, 2000. *See* Attachment 2 hereto (cover letter from ISO transmitting data). Thus, the Commission is actively seeking information necessary to develop the empiric framework for the refund question.

[7] Unlike traditional cost-of-service ratemaking, involving a single rate tariff with limited services and rates, the California situation involves real-time markets with constantly changing rates conducted through literally thousands of transactions. It is unlikely that the traditional refund calculus can adequately deal with the new situation.

Petitioner seeks to create the impression that the refund question is the only rate issue facing the Commission with regard to the California situation. Pet. 20-25. That impression does not give justice to the onslaught of rate issues that have inundated the Commission regarding California restructuring. As noted in the November 1 Order at 61,349, "evolving California market issues [have led to] over 85 Commission orders since the time the restructured California markets began operation in 1998." The December 15 Order, at 61,983-92, summarizes the voluminous pleadings and Commission responses since last summer. Attachment 3 hereto is a list of pleadings filed with the Commission and Commission orders that have been issued since November 1, 2000 regarding California restructuring rate issues.[8] Given the level of activity on this one area (which does not encompass all the other areas that are also subject to Commission jurisdiction), it is apparent that the Commission has not been shirking its duties.

In sum, Petitioner has not shown that its claim to have its refund questions decided is "clear and certain." It is not evident that Petitioner will benefit from an immediate resolution of the refund questions for wholesale rates, due to the AB 265

[8] While Petitioner states that its refund request should be given preferential treatment under 16 U.S.C. § 824*e*(b) (Section 206(b) of the FPA), Pet. 22-23, virtually all California matters involve rate issues arising under either Section 205 or Section 206 of the FPA that are to be accorded the same preferential treatment.

rate ceiling. On the other hand, delay in wholesale refunds can be remedied by payment of statutorily-required interest to wholesale purchasers. Finally, the Commission's choice to address forward-looking rate issues, and to put off review of past refund questions until it has examined information that it has already begun to collect rationally budgets the Commission's resources in this area.[9]

IV. Allowing Refunds Is A Discretionary, Not A Ministerial, Act

The second element needed for mandamus to issue is that "the official's duty is ministerial and so plainly prescribed as to be free from doubt." *Azurin v. Von Raab*, 803 F.2d 993, 995 (9th Cir. 1986). A ministerial act has been defined as "a clear non-discretionary obligation to take a specific affirmative action, which obligation is positively commanded and so plainly prescribed as to be free from doubt." *Independent Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997) (citations omitted). Neither resolving threshold legal questions nor determining and ordering refunds, Petitioner's proposed remedies, can be fairly characterized as ministerial acts.

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[9] This last consideration sufficiently answers Petitioner's claims , ¶¶ 1 and 3, in its February 28 letter that the Commission should devote more time to Petitioner's issues. As to Petitioner's claim (¶ 2) that the tolling orders related to the November 1 and December 15 Orders have improperly forestalled review, little needs be said. Given the complexity and volume of rehearing requests, it is hardly surprising that the Commission needs more than the 30 days allowed by statute to act. A tolling order avoids the stricture of FPA § 313(a) that a rehearing is deemed denied unless acted upon within 30 days of its filing.

The threshold legal questions, which address refund periods and guidelines for determining just and reasonable market-based rates, were matters that elicited considerable discussion. *See* November 1 Order at 61,376 (Staff analysis of refund authority) and December 15 Order at 61,998 (comments on analytical framework for determining just and reasonable market-based rates). Those comments demonstrate that the legal issues related to refunds are not plainly prescribed. Similarly, the intertwined factual questions are complex and do not lead to a clear answer. *See id.* (in instant circumstances, "independent of any conclusive showing of a specific abuse of market power, a variety of factors have converged to drastically skew wholesale prices under certain conditions").

As resolution of those legal and factual issues requires the Commission to resolve competing considerations, such resolution cannot be a ministerial act. *See Azurin*, 803 F.2d at 999 (indicating that agency's duty "when faced with facially valid conflicting claims . . . is not 'ministerial'"); *Independent Mining*, 105 F.3d at 509 n. 8 ("merely because a task involves an 'objective' standard of review does not mean that it is a ministerial act."). Petitioner also admits that "FERC has discretion to order refunds." Pet. 16. In short, nothing Petitioner seeks to compel the Commission to do is ministerial. Consequently, Petitioner's petition fails on the second element of the mandamus test.

V. Other Adequate Remedies Are Available

As discussed (*infra* at pp. 7-9), the statute requires that wholesale refunds be paid with interest, a refund condition was set for October 2, 2000 through December 31, 2002, and refunds can be ordered with interest if a court rules the Commission erred. Thus, whatever refunds are ultimately allowed, wholesale purchasers will receive an adequate remedy for delay. This means that the third element of the test does not favor issuance of the writ.

Petitioner proffers several puported equitable grounds for granting mandamus. Pet. 17. This Court has made clear, however, that equitable grounds do not come into play unless the three required elements have been met: "Plaintiffs contend that even if the statutory duty is discretionary the court must consider equitable factors in deciding whether mandamus should issue. Plaintiffs are incorrect. . . . Equitable considerations are relevant only when the duty to act is clear and mandamus is otherwise appropriate." *Han v. United States Dept. of Justice*, 45 F.3d 333, 338 n. 4 (9th Cir. 1995)(internal quotation marks and citations omitted).

The six factors in *TRAC v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), do not show that relief should be granted, contrary to Petitioner's view. Pet. 27. As the six factors are largely subsumed within the earlier discussion, we only briefly reiterate those points. Essentially, the six factors address whether an alleged delay can be considered to be

reasonable. Here, by any rule of reason, given the complexity of the situation and the need for immediate relief on multiple fronts to alleviate the problems resulting from a continuing, dysfunctional market, delaying resolution of past refund questions in the face of more pressing current problems is acceptable. The so-called delay amounts to no more than a few months during which the Commission has acted on a host of related problems in the California market, and has begun to collect information to be used in examining the issues.

VI. There Is No Grounds For The Court To Retain Jurisdiction

Apparently recognizing the inadequacy of its mandamus claims as well as the incurable prematurity of its petition for review, Petitioner seeks a backdoor means for having this Court supervise further action by the Commission. Petitioner seeks to justify its request for the Court to retain jurisdiction on the ground that "FERC's delays in setting lawful wholesale rates have allowed the unlawful rates to 'become, for all practical purposes, the accepted' rates." Pet. 27-28. Nothing could be further from the truth. The Commission continued the refund obligation through December 31, 2002, set a refund effect date under Section 206 of October 2, 2000, required all sellers above the $150 breakpoint to provide weekly reports, and required the ISO and PX to provide monthly reports on all bids. It also indicated further that it will put new rate

monitoring and mitigation measures in place by May 1, 2001 to offer faster response to potential rate problems.

Given all these indications that rates being charged in California since October 2, 2000 remain subject to investigation and possible refunds, it is inconceivable that sellers or buyers could necessarily assume that particular rates have been accepted as lawful. By these means, the Commission has taken the necessary steps to put all parties on notice that no rates have been "accepted," but, rather, that all rates still remain open for possible reduction and refund.

Petitioner's efforts to paint this situation as nearly matching that in *TRAC* must be rejected. In *TRAC*, the FCC took "no further action during the almost five years since the filing of comments" on the single issue of the proper return for AT&T in 1978. 750 F.2d at 73. In addition, the FCC had twice told Congress that it would act on the matter by a certain time, and failed to do so. *Id*. These latter failures led the Court to retain jurisdiction. *See* 750 F.2d at 80 ("in light of the Commission's failure to meet its self-declared prior deadlines," court decides to retain jurisdiction).

In contrast, California restructuring has presented the Commission with a multiplicity of issues, many of which were matters of first impression. Between 1998, when restructuring was implemented, and the present, the Commission has issued over 100 orders, addressing a wide variety of questions, on California restructuring issues.

As the problems deepened over the past several months, the Commission responded with alacrity to numerous motions on complicated matters. *See* Attachment 3 (listing pleading and orders since November 1). This picture does not remotely resemble the portrait of inactivity presented in *TRAC*.

Contrary to Petitioner's implied plea, a court should not automatically retain jurisdiction whenever it rejects a writ for mandamus. Nothing in the instant situation suggests the Commission is ignoring its responsibilities or has unreasonably set priorities for dealing with the multi-faceted issues presented. That Petitioner would follow a different set of priorities geared to its own self-interest is hardly grounds for this Court to supervise the Commission, either by granting mandamus or by retaining jurisdiction.

CONCLUSION

For the reasons stated here and in our motion to dismiss, the Commission requests that the Court (1) deny the petition for writ of mandamus and (2) dismiss the petition for review.

Respectfully submitted,

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